

The Business of State Supreme Courts, 1870-1970†

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The highest courts of the 50 states are by any measure important legal institutions. The state supreme courts (SSCs) handle an enormous volume of significant cases every year, cases that have made the journey up the steep ladder of appeal. Although often overshadowed in the public eye by the federal courts, SSCs decide many fundamental issues of individual rights and governmental powers.¹ They are the courts of last resort on most issues of commercial and property law, family and inheritance law, tort and criminal law, and powers and procedures of local government.²

Lawyers and legal scholars in the various states follow the work of their SSCs, analyzing the meaning of current decisions that will affect their lives and work. Social scientists have produced a handful

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1. See Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973); Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda and the Use of Judicial Impact Analysis*, 27 W. POLITICAL Q. 38 (1974).

2. Of the 5,904 SSC cases in our sample, only 124 (2%) were the subject of an appeal to or petition for review by the United States Supreme Court, and only a handful of these 124 actually gave rise to opinions in that court.

of studies of particular courts and judges.³ But surprisingly few scholars have conducted empirical research on the *business* of the SSCs—the volume of cases handled, the type of issues that appear, the kind of litigants served, the rate of affirmance or reversal of lower court decisions, and the variation in these factors across states and over time.⁴

This Article is the first report of an extensive research project designed to investigate the business of SSCs and the responsiveness of their workload to social change. The study is based on a sample of 5,904 cases decided by 16 SSCs between 1870 and 1970.⁵ Although these decisions include important and interesting cases, they are not necessarily “leading cases,” but rather a representative sample of the entire flow of SSC litigation. Drawing upon that sample, the first objective of this Article is descriptive: to set out the basic trends in the size and focus of SSC workloads. How has the overall volume of SSC caseloads changed over the years? Has it increased, declined, remained stationary, or followed some other pattern? What have been the changes within particular areas of law? Which legal issues have been gaining in the courts? Which tend to be receding?

The second purpose of this Article is more theoretical: to increase our understanding of the complex relationship between legal institutions and society, and the effect of economic, legal and institutional change on the nature and volume of adjudication. To what extent, and in what areas of life and law, are changes in the surrounding society reflected in the work of SSCs? What institutional

3. See, e.g., L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957); T. MORRIS, *THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS* (1975); F. SMITH, *JUDICIAL REVIEW OF LEGISLATION IN NEW YORK, 1906-1938* (1952); Beiser, *The Rhode Island Supreme Court: A Well-Integrated Political System*, 8 *LAW & SOC'Y REV.* 167 (1974).

4. Examples of comparative analysis include explorations of the relationship between judicial background and dissent rates, see, e.g., Canon & Jaros, *External Variables, Institutional Structure and Dissent in State Supreme Courts*, 3 *POLITY* 175 (1970), judges' attitudes toward their judicial role in society, see, e.g., H. GLICK, *SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE* (1971); Vines, *The Judicial Role in the American States*, in *FRONTIERS OF JUDICIAL RESEARCH* 461 (J. Grossman & J. Tannenhaus ed. 1969), and the relationship between judicial attitudes and substantive outcomes in selected types of cases decided by particular SSCs, see, e.g., Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 *AM. POLITICAL SCI. REV.* 57 (1969); Fair, *An Experimental Application of Scalogram Analysis to State Supreme Court Decisions*, 1967 *WIS. L. REV.* 449. Atkins & Glick, *Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort*, 20 *AM. J. POLITICAL SCI.* 97 (1976), and Canon & Jaros, *State Supreme Courts—Some Comparative Data*, 42 *ST. GOV'T* 260 (1969), address issues similar to those discussed in this paper but use cross-sectional rather than historical data.

5. Data on file with the authors.

arrangements make the SSCs more responsive to new social problems and new classes of litigants, and how do these arrangements affect legal development?⁶

We would like to suggest at least the beginnings of an explanation for changes in SSC business. Between 1870—the America of Reconstruction and the horse and buggy—and 1970—the America of Richard Nixon and the space age—lies an immense gulf. At one extreme, we can envision the SSCs as simple mirrors of social changes during those years; we would expect powerful relationships between changing *social and economic conditions* and the work of the SSCs. From this perspective, as the rates of crime, divorce and business activity rose and fell, appellate court agendas would shift to reflect those problems that loomed largest in the greater society.

There are, however, other ways to look at the work of the SSCs in relation to society. The SSCs might be more directly responsive to their legal environment—legal forms, ideas and institutions that blunt the immediate impact of social change. States differ, for example, in the number of SSC judges prescribed by law, in the use of intermediate appellate courts, in the human and material resources devoted to SSCs. It would be reasonable to expect fluctuations in *judicial structure* to leave their mark on the workloads of SSCs.

The distribution of cases on an SSC docket also may be influenced by variations in legal thought or *judicial culture*. Judges are members of a common profession. They are trained in the law, and there are important continuities in legal education and doctrine across states. But the judiciary in each state also may develop particular traditions, depending partly on whether judges are elected or appointed, whether they come predominantly from backgrounds in politics or law enforcement, whether they are liberal or conservative. Resulting differences in judicial culture may explain variations in SSC caseloads and opinion writing among states that are socioeconomically similar.⁷

6. To legal scholars in particular, it may seem odd that we have omitted, as a major topic of this study, changes in the rules and principles enunciated in SSC opinions, the public policies they embody or the philosophy of judicial decisionmaking they represent. These are important aspects of the work of SSCs. But the novelty of this study lies in its attempt to look at a large sample of court cases, and rules and principles cannot be handled quantitatively, and in the mass.

7. A few studies have tried to tap judicial culture. They have found striking variations in judicial attitudes—toward precedent, for example, or the propriety of considering the social context of a case. How these attitudes translate into behavior is, of course, a difficult question. See H. GLICK, *supra* note 4; S. NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS* (1973); Beiser, *supra* note 3; Daynard, *The Use of Social Policy in Judicial Decision-Making*, 56

Finally, the institution we are studying is, after all, a court of law. Changes in *substantive doctrine* alter the work of courts. Before zoning ordinances, there were no zoning cases. A court, by bold or novel decision, may open up a promising (or lucrative) line of litigation. Doctrine in some areas of law may become "settled," removing some types of cases from SSC dockets. Our second task in this Article, then, is to explore, at least in a speculative way, the relative importance of shifts in substantive law—as compared with judicial structure, judicial culture and socioeconomic change—in shaping SSC dockets.

Part I of this Article sets forth our research method in some detail. In Part II, we outline changes in the aggregate caseload of SSCs between 1870 and 1970 and discuss implications of those changes for the legal role of SSCs. Part III describes changes in the types of cases that have made up SSC agendas and explores the relationship between those changes and selected indicators of social and economic change.

I. RESEARCH METHOD

A. *Sampling Design*

If there had been no barriers of time, money or other resources, we would have read every opinion of every SSC. But time, money and resources acted as constraints, and we knew we would have to settle for a sample of approximately 6,000 cases. We wanted our study to include contemporary cases, but we also wanted a time span long enough to get a sense of the SSC response to social and economic change. The 100 years beginning in 1870, we decided, would provide us with a sufficient range of social and economic change. Within that time span, we did not want to spread the sampled cases too thin; hence we decided to sample both states and years. We decided that 16 states—one-third of the total number in the country (excluding Hawaii and Alaska, which became states only

CORNELL L. REV. 919 (1971). On the backgrounds and prior careers of SSC judges, see Canon, *Characteristics and Career Patterns of State Supreme Court Justices*, 45 ST. GOV'T 34 (1972); Canon, *The Impact of Formal Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579 (1972).

One fact about the general culture of judges is worth mentioning. The SSCs, throughout most of our history, have been relatively isolated from each other. In the United States, the bench comes from the bar, and both bench and bar tend to be doggedly local. A Tennessee judge does not transfer to Nevada. Judges of one state for the most part do not meet judges from other states, socially or professionally. Recently, there has been a movement to foster better relations among SSC judges. See R. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* at xii-xiii (1976). For most of the period studied, however, this was not the case.

toward the end of our 1870-1970 research period)—would give us a sample representative of the country as a whole. To choose the states, we segregated the 48 states into clusters—groups of states that proved to be most alike for most of the 100-year period, based on data for population, industrialization, urbanization, per capita income, and racial composition as drawn from decennial census records, as well as on evaluations of legislative innovativeness⁸ and other variables that seemed likely to bear some relationship to the legal business of a state court system.⁹ One cluster included plains states, such as Kansas, Nebraska and the Dakotas; another consisted of the most urban, industrialized states (including the states of the Northeast, the Great Lakes and California). The Southern states and the Rocky Mountain states formed two more clusters. The fifth cluster was, on the surface, much more mixed, but its members shared some major social and economic characteristics. It contained Colorado, Delaware, Florida, Maine, Minnesota, Oregon, Utah, and Washington. From each of the five clusters, we selected states randomly, taking the size of the cluster into account. The 16 chosen were Alabama, California, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and West Virginia.¹⁰

8. See Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POLITICAL SCI. REV. 880 (1969).

9. The demographic and socioeconomic measures were taken from census data assembled by Richard Hofferbert and made available through the Inter-University Consortium for Social and Political Research, University of Michigan. See generally Hofferbert, *Ecological Development and Policy Change in the American States*, 10 MIDWEST J. OF POLITICAL SCI. 464 (1966). The state clusters, representing relatively homogeneous groups of these variables, were derived with techniques from R. SOKAL & P. SNEATH, *THE PRINCIPLES OF NUMERICAL TAXONOMY* (1963).

10. Because we tried to be systematic in our sampling, we believe that this group of states, and hence the experience of their SSCs, is reasonably representative of all SSCs in the nation. The group contains large states such as California and Illinois, and small states such as Idaho. There is an Eastern industrial state (New Jersey), and a Midwestern farming state (Kansas). There are Southern states, Northern states, a sparsely populated desert state (Nevada), and New England's Maine and Rhode Island.

Among the missing, however, are Massachusetts, New York and Pennsylvania. Some legal scholars feel that these three states are unique—they have had unusual legal prestige and influence and more than their share of influential cases, which cannot be matched in scope by other states, whatever their population and wealth. Hence, these states (it is said) occupy positions for which no other states can substitute.

This objection would be valid if we were studying the development of legal doctrine or "leading cases." But this study focuses on the flow of *kinds* of cases and their relationship to socioeconomic trends. We feel that the crucial differences and similarities among states lie in the nature of their economies, their populations and their substantive law, rather than in the prestige of their courts. And while there are undoubtedly differences between the law and economy of New York, for example, and Illinois, we would not expect the slight differences in

Rather than draw a "thin" sample from cases decided by the 16 SSCs in each year between 1870 and 1970, we decided to concentrate our sample by using 5-year intervals. The first sample year was 1870; the second, 1875; the 21st and last, 1970. To reach our goal (and financial limit) of approximately 6,000 cases, we could sample 18 cases decided by each SSC in each of the 21 sample years. These were chosen at random from all the published opinions of each SSC in 1870, 1875 and so on through 1970.¹¹ This procedure gave us a sample of 288 cases for the 16 SSCs in any sample year, and a total of 5,904 cases for the 100-year period.¹²

B. Coding

The process of developing a code capable of describing the sampled cases in a quantifiable form proved difficult and time-consuming. The code had to be objective enough so that different coders would apply the same criteria. At the same time, it had to be supple and subtle enough to capture the enormous variety of almost 6,000 cases from 16 different states, distributed over a century of

substantive law and economic specialization within the cluster of urban, industrial states to have a *major* impact on the types of cases decided by their SSCs over time, as long as our categories for classifying SSC cases are *general* (such as "debt collection," "tort," "business regulation"). Thus, we believe that our results would not be materially different had we chosen Massachusetts, New York and Pennsylvania rather than the economically and socially similar states of Illinois, Michigan, New Jersey, and Rhode Island.

Our belief that we lost little when our random choice failed to select those legally prominent states rests on more than logic. We sampled the cases decided by New York's SSC for a number of years. Its distribution of kinds of cases was not substantially different from other states in its cluster, supporting our view that our sample of states fairly represents the states as a whole.

11. For each SSC and sample year, the total population of cases from which the 18 cases were selected was determined by counting the entries in the *Shepard's Citations* volumes for SSC cases decided in that year. This excluded unpublished opinions or those decided without opinion. We also excluded rehearings, motions for rehearing and opinions of less than one page. This is a study, therefore, of cases treated as significant by the courts themselves. The 18 cases were chosen by picking 18 numbers from a table of random numbers, counting down the list of entries in *Shepard's* for the year in question and choosing the correspondingly numbered citations.

12. This total sample is less than the target figure, which would be 18 cases x 21 sample years x 16 states = 6,048 cases, because South Dakota and Idaho were not admitted to the union until 1889 and 1890 and therefore provided no cases for the 1870, 1875, 1880, and 1885 sample years.

The 5,904 cases were drawn from a total of 66,950 opinions published by the 16 SSCs in the 21 sample years, an average of about 200 opinions per SSC per sample year. Eighteen cases per sample year is not an imposing figure, but when we aggregate the sampled opinions for 16 states for 30-year periods, as we do in the text, we are dealing with a very reliable sample of 2,016 cases. Similarly, when we aggregate a single SSC's sampled cases for a 30-year period (7 sample years), the sample size is 126, enabling us to generalize about that SSC's overall workload with considerable confidence. See H. BLALOCK, *SOCIAL STATISTICS* 392-412 (1960).

changing kinds of disputes and shifting legal terms. The code developed gradually, out of a series of trials—and errors—and through many experimental drafts. An elaborate document in its own right, the final code can be broken down into five discrete parts. For each supreme court case, information was recorded about the following:

(1) The procedural history of the case. Did the case come to the SSC directly from a trial court or through an intermediate appellate court or an administrative agency? What was the legal result in previous forums?

(2) The nature of the parties. How many parties were there on appeal? Were they business organizations, sole proprietors, governmental units, or individuals? What were their legal roles (for example, landlord or tenant, creditor or debtor)?¹³

(3) The area of law. What area of law underlay the plaintiff's claim in the trial court? What additional areas of law were brought into the case by defenses or counterclaims? The code for area of law contained about 75 categories, based first on broad legal categories (such as criminal law, torts, real property law) and then on subcategories describing more specific types of events, disputes or transactions from which the case emerged (such as murders or railroad accidents). We also coded separately the incidence and type of constitutional issues and whether the case turned largely on "purely procedural issues."¹⁴ This coding gave us some information about the "fit" between the substantive area of law underlying the plaintiff's claim in the trial court, and the issues argued in the SSC.¹⁵

(4) The outcome of the case. We coded which parties won and which lost, whether the cases were affirmed or reversed and how constitutional issues were decided.

13. We would have liked to record occupation, socioeconomic class and race for individual parties, and the size of business firms, but court opinions rarely gave enough information for accurate judgment. We were able to record the type of business in most cases, using the Office of Management and Budget's Standard Industrial Classifications. See OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1972).

14. "Purely procedural issues" included questions of court jurisdiction, service of process, conduct of trials, rules of appeal, and the like, which clearly did not concern or turn on the substantive rights of parties or substantive rules of law. Only procedural issues that were discussed for a page or more were coded.

15. Ideally, one would log each issue at every stage of a case, but we quickly learned that legal issues in a single case, particularly at the appellate level, are often so numerous and interlocking that attempting to code them all would be unreliable. The area of law invoked in the plaintiff's lower court action, we determined, provided the most reliable way of describing the general nature of the case, if we supplemented it with separate notations of new issues raised by defendants, as well as constitutional and purely procedural issues. See Cartwright, *Conclusion: Disputes and Reported Cases*, 9 LAW & SOC'Y REV. 369 (1975).

(5) Style and importance of decisions. We recorded the length of opinions, the incidence of dissents and concurrences, and the frequency of citations of various authorities, such as in-state, out-of-state or federal cases and statutes, as well as treatises and law reviews. Finally, we noted an opinion's subsequent fate in the court system—how often it was cited by other appellate courts, in and out of the state. This coding gave us a rough measure of which cases became important precedents.

A team of 10 law students worked on the coding operation, which proved in general to be an immense, almost intractable task. To insure reliability and objectivity, we double-coded a random 10 percent of the cases. We reread and recoded hundreds of additional cases when computer editing routines warned us of possible error or when we determined that the original code had provided insufficient detail.¹⁶

II. STATE SUPREME COURT CASELOADS: THE GROWTH OF SELECTIVITY

In 1870, of the 16 states in our sample, only New Jersey had an intermediate court of appeals (IAC) between the trial court and the supreme court. The SSCs had little or no discretion to select cases; they heard whichever cases losing parties chose to appeal from trial courts. As population grew and law intruded more deeply into the life of an industrializing society, the volume of cases on SSC dockets grew dramatically. As Figure 1¹⁷ suggests, SSCs issued an average of only 131 opinions in 1870. By the 1890-1930 period, however, the

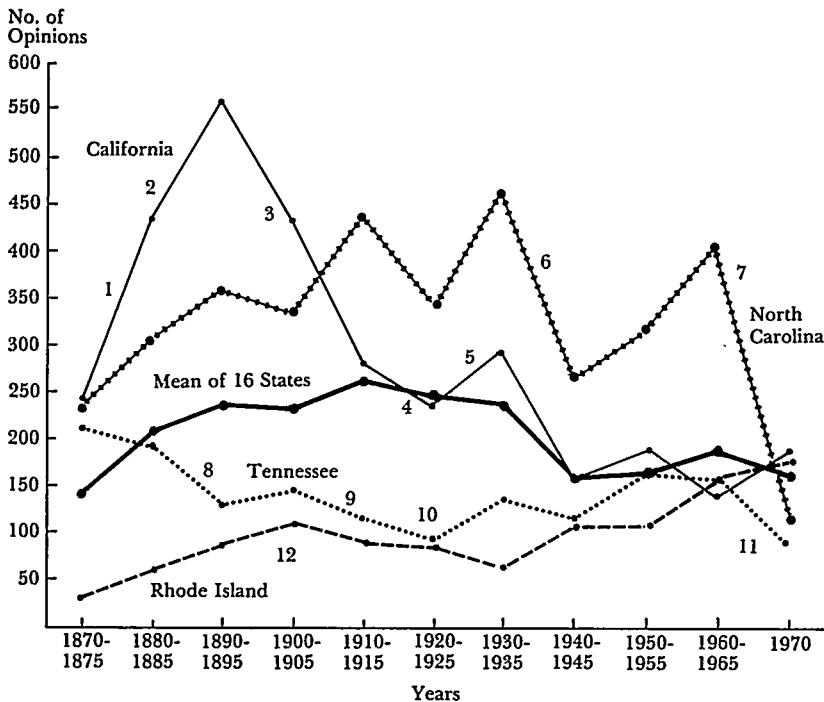
16. Computer editing routines, containing approximately 150 checks, were constructed to identify (1) out-of-range values (illegitimate and impermissible punches for each variable), (2) logical inconsistencies (*e.g.*, cases coded as both an appeal and an original action in the SSC) and (3) statistically infrequent or implausible relations (*e.g.*, criminal cases with an appellant prosecutor or no government party listed). In these cases of "error," the punched values were corrected by a direct-access, interactive program that also created a historical record (listing date, operator, variable, etc.) for each correction.

17. The states selected for graphic display in Figure 1 represented four typical patterns. California, a state that grew rapidly to a large population and had very large SSC caseloads, established a system of IACs near the turn of the century; its volume of SSC opinions thereafter declined to an average level, despite continuing population growth. Tennessee and North Carolina, medium-sized states, experienced identical population growth, from about 1 million in 1870 to 2.5 million in 1925 and 4 million in 1970. Tennessee established an IAC system early in its growth, however, and thereafter had less-than-average numbers of SSC cases. North Carolina did not establish an IAC until 1967, and its SSC had very high caseloads. Rhode Island is typical of small states whose populations grew slowly, never reaching 1 million, and whose SSC caseloads remained small without the creation of an IAC system.

In Figure 1, the number-of-opinions points represent an average of SSC published opinions in each of the 2 sample years paired on the horizontal axis. The figures exclude per curiam and memorandum opinions of less than one page.

average annual volume of cases was over 230, with a peak average of 291 cases in 1915. SSCs in many of the larger states issued twice that number in some years.¹⁸

Figure 1
Number of Opinions Published by SSC
Annually, Selected States



1. 1879 Cal. SSC divides into two departments or panels.
2. 1885 Cal. SSC begins use of commissioners.
3. 1904 Cal. IAC created.
4. 1918 Cal. IACs expanded.
5. 1928 Cal. IACs expanded.
6. 1937 N.C. SSC expanded.
7. 1967 N.C. created IAC.
8. 1895 Tenn. created IAC for chancery cases.
9. 1907 Tenn. created IAC for all civil cases.
10. 1925 Tenn. IAC expanded.
11. 1967 Tenn. IAC for criminal cases created.
12. 1905 R.I. SSC reorganized and reduced in size.

18. For our method of establishing the annual volume of cases, see note 11 *supra*. By excluding opinions of less than a page, usually per curiam or memorandum decisions, we have understated the number of decisions issued by the SSCs. As noted earlier, we have chosen to emphasize the cases that the SSCs themselves treated as significant.

In California and Michigan, for example, as the population doubled in the 1870-1895 period, SSC caseloads rapidly climbed to over 400 cases a year. In Illinois, which experienced its period of explosive growth earlier, the SSC issued 626 opinions in 1875. The Alabama Supreme Court issued 525 opinions in 1910.¹⁹ Legislatures responded by increasing the number of judges on the courts. The expanded California Supreme Court also divided into two separate panels and assigned some opinion writing to "commissioners."²⁰ The extra court capacity often drew still more appeals: The California Supreme Court issued an average of 558 opinions a year in 1890 and 1895, and the Michigan Supreme Court averaged 579.

With caseloads of that size, SSCs obviously did not have as much time available for careful deliberation and reasoned opinion writing. SSCs with so many cases, one would think, had no time for creativity, for lawmaking, for rethinking and readjusting common law policies. Indeed, legal scholars have seen the style of courts in the 1880's and 1890's as very formal, very cut-and-dried. The "grand style" of the mid-19th century, in which judges presumably had in mind basic policies and "instrumental" considerations, had given way to a "formalistic" style, in which judges, perhaps because they were politically conservative, stressed the mechanical application of precedents and often seemed to dispose of cases on the basis of technicalities.²¹ As yet, our data do not permit us to test any such theory about the sources of the change in style—a theory that may well be wrong or unprovable. But it is interesting to look at the idea in light of the dramatic upsurge in caseloads. Perhaps what appeared to be a change in style brought about by changing ideology was basically an organizational response to an overwhelming volume of cases—an effort to make decisionmaking faster and more automatic by an emphasis on rules.²²

Eventually—usually when a state's population reached the 1.5-2.5 million range—measures were taken to reduce the volume of

19. Other courts also handled huge caseloads. The Minnesota Supreme Court issued 485 opinions in 1925. The Kansas and North Carolina Supreme Courts issued an average of 440 opinions in 1910 and 1915.

20. CAL. CONST. art. VI, § 2; Blume, *California Courts in Historical Perspective*, 22 HASTINGS L.J. 121 (1970). Michigan's Supreme Court was expanded from 3 to 5 justices in 1887, Act of Feb. 5, 1887, Pub. Act No. 6, 1887 Mich. Pub. Acts 5, and then to 8 in 1903, Act of June 18, 1903, Pub. Act No. 250, 1903 Mich. Pub. Acts 413 (repealed 1963).

21. See generally K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 160-66 (1945); Horowitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

22. See R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 83-113 (1963); J. THOMPSON, *ORGANIZATIONS IN ACTION* 66-82 (1967).

appeals decided by SSCs. The principal method was to give the SSC more discretion to select its cases from the mass of petitions for review. Michigan, for example, eliminated appeals to the SSC "as of right" for most criminal cases in 1927.²³ Larger states also created IACs to absorb first appeals in some kinds of cases.²⁴ Some states took this action early in their growth curves;²⁵ others let their SSCs struggle with large caseloads for extended periods of time.²⁶ In states with IACs and SSC case-selecting discretion, the average volume of opinions tended to come down to 200 or fewer each year.²⁷ By 1970, of the states in our sample with a population over 2 million, only Minnesota and Kansas had not created IACs. The Minnesota Supreme Court's caseload in 1970 was 332 cases, almost twice the mean 1970 caseload for the other states (167).²⁸

The combination of discretion to select cases and creation of an IAC buffer seems to have a dramatic effect on the style and function of SSCs. North Carolina's experience is illustrative. In 1967, its SSC wrote 473 opinions. In 1969 and 1970, after creation of an IAC and a grant of almost full discretion to pick and choose appeals from IAC decisions, it averaged 94 opinions. This does not mean the justices were fishing more and working less. They now had to screen petitions for review, and there are indications that they began to spend more time and effort on each case they accepted. The average 1969 opinion was almost twice as long as that of 1967, and dissents and reversals were more frequent. The North Carolina Supreme

23. Act of May 14, 1927, Pub. Act No. 175, 1927 Mich. Pub. Acts 281.

24. On the functions and staffing of IACs, see Fair, *State Intermediate Appellate Courts: An Introduction*, 24 W. POLITICAL Q. 415 (1971); Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

25. New Jersey created an IAC for cases arising "at law" (as opposed to equity cases) in 1844. N.J. CONST. of 1844, art. VI, § 5. Tennessee did so for equity cases in 1895. Act of Apr. 29, 1895, ch. 76, 1895 Tenn. Pub. Acts 113 (current version at TENN. CODE ANN. § 16-401 (1955)). Their SSCs, accordingly, never decided many more than 200 cases annually for any period of time.

26. Illinois and California created IACs only after their SSCs had astronomical caseloads, in 1877 and 1904 respectively. CAL. CONST. art. VI, § 4 (1879, amended 1904); Act of June 2, 1877, 1877 Ill. Laws 69 (current version at ILL. ANN. STAT. ch. 37, § 25 (Smith-Hurd Supp. 1976)). Michigan and North Carolina waited until relatively recently before instituting IACs. MICH. CONST. art. 6, §§ 1, 8-10 (1963); N.C. CONST. art. 4, §§ 7, 12(2), 16 (1970).

27. The California SSC averaged 166 opinions in the 1950-1970 period, New Jersey, 141, and Tennessee, 139. In Illinois, however, where the SSC had less discretion to turn down appeals from the IAC, the average number of SSC opinions was 244 in that period and as many as 338 in 1970.

28. Smaller states with populations under 1 million—such as Idaho, Maine, Rhode Island, and South Dakota—have been able to keep SSC caseloads at a moderate level (less than 150 cases a year) without creating IACs. In Nevada, however, where population doubled in the 1960's, the number of SSC opinions jumped from less than 100 in 1960 to 218 in 1970.

Court came to think of itself as a lawmaking and policymaking court; to quote a 1969 report, it now considered only "truly significant questions of law."²⁹

Similarly, in our 16 states taken as a whole, the gradual growth in the SSCs' capacity for selectivity has been reflected in a declining annual number of opinions (the average was only 167 during 1950-1970), an increase in average opinion length (from 4.6 pages in 1890-1930 to 6.7 pages in 1970) and an increase in dissenting and separate concurring opinions (these appeared in 8.7 percent of all cases in 1870-1900, in 10.5 percent in 1905-1935, in 15 percent in 1940-1970).³⁰ The proportion of SSC cases involving constitutional issues rose from 8.2 percent in 1870-1935 to 14.7 percent in 1940-1970, and an increasing proportion of constitutional issues involved Bill of Rights provisions in the state or federal constitution.

This apparent shift of focus to a smaller number of perhaps more significant and controversial cases, it should be emphasized, is of surprisingly recent vintage, and it is far from uniform across states. In Alabama, Maine and Tennessee, over 95 percent of SSC opinions in the 1940-1970 period were unanimous. Only 5.6 percent of Alabama and Rhode Island SSC cases in that period involved constitutional issues. And of the 288 SSC opinions in our sample issued in 1960, only 35 percent had been cited in more than five subsequent reported cases by 1974.³¹ Nevertheless, there is an overall trend toward fewer, more significant cases, an increase in SSC discretion to limit and choose the cases to be decided and, if a higher dissent rate is any guide, an increased willingness to innovate.³²

III. SSC AGENDAS: NATIONAL TRENDS

Accompanying the decline in volume of SSC opinions over the past few decades, there has been a shift in the *kinds* of cases that have occupied the SSCs' attention. At the beginning of the period

29. Groot, *The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 WAKE FOREST L. REV. 548 (1971).

30. In some SSCs with greater case-selecting discretion, the incidence of separate dissenting or concurring opinions has gone even higher: Only 55.5% of the Michigan Supreme Court's opinions were unanimous in the 1960-1970 period, and only 61.1% of California's. In the United States Supreme Court, by contrast, only about 25% of full opinion cases have been unanimous in the 1960-1970 period, although 89% were unanimous as recently as 1930. See J. GROSSMAN & R. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 165 (1972).

31. A recent study of the Rhode Island Supreme Court, for example, concluded that fewer than 10% of the cases seemed to have any significance as precedent. See Beiser, *supra* note 3, at 174-75.

32. Moreover, as states move from a 2-tier to a 3-tier system of courts, litigants face a longer and more expensive ladder of appeals before they reach the SSC. These difficulties filter less controversial or less financially significant cases out of SSC dockets.

(1870), SSCs were deeply involved in ordinary commercial disputes—disputes over title to real estate, foreclosure of mortgages, creditors' rights against defaulting debtors and failed businesses. They decided mostly cases of commercial, contract and property law. Their basic function, at least quantitatively, was to settle private disputes arising out of *market* transactions.

In the succeeding 100 years, these courts shifted their focus in a significant way. The shift was not, perhaps, what one might have expected. In the mature, industrial age, the SSCs appear to do *less* work on commercial and industrial transactions, not more. The law certainly intervenes in commerce and trade, and debt collection still has a massive place in the work of lower courts,³³ but the focus of economic and commercial regulation has shifted away from the upper reaches of the court system to other branches and levels of government. Now SSCs are concerned much less with elaborating private-law commercial doctrine and much more with nonmarket problems. Many of these problems arise out of the confrontation between citizen and state. Others come from the confrontation between body and machine that produces accident cases. Still others pose questions of human rights and due process. Our study shows a great increase in tort and criminal cases and a drop in contract and debt collection cases; it shows more public law cases and, except for government regulation of land use, fewer property cases.³⁴

Table 1
Percent of SSC Cases by Area of Law, All States

| | 1870- 1900 | | 1905- 1935 | | 1940- 1970 | | All Periods | |
|--|---------------|-----|---------------|-----|---------------|-----|-------------|------|
| | % | n* | % | n | % | n | % | n |
| DEBT AND CONTRACT | 33.6 | 630 | 29.3 | 591 | 15.0 | 303 | 25.8 | 1524 |
| Debt collection—insolvency cases, actions on notes, mortgages, credit sales, judgments | 25.8 | 483 | 18.8 | 378 | 7.5 | 151 | 17.1 | 1012 |
| Contracts for goods and services—disputes over performance, validity | 3.3 | 62 | 4.8 | 96 | 2.9 | 58 | 3.6 | 216 |

33. See, e.g., Wanner, *The Public Ordering of Private Relations*, 8 LAW & SOC'Y REV. 421 (1974). Wanner examined 7,800 randomly chosen civil cases from Baltimore, Cleveland and Milwaukee trial courts in 1965-1970. In his sample, over one-half of the actions involved debt collection, contract damages or liens. *Id.* at 422.

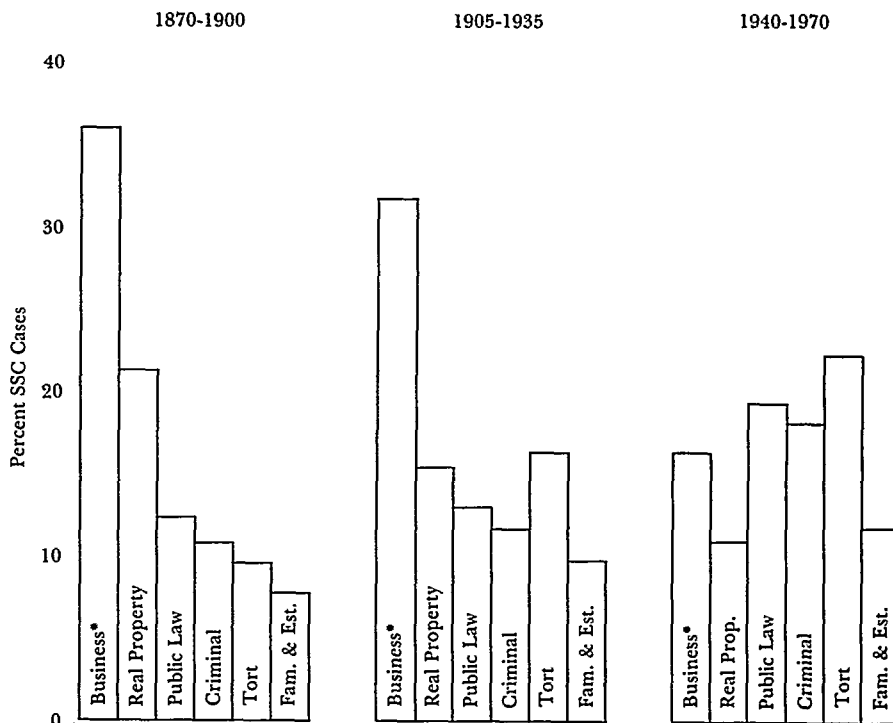
34. See text accompanying notes 35-71 *infra*.

| | 1870- 1900 | | 1905- 1935 | | 1940- 1970 | | All Periods | |
|--|---------------|-----|---------------|-----|---------------|-----|-------------|-----|
| | % | n* | % | n | % | n | % | n |
| Insurance, employment, other contracts | 2.5 | 47 | 4.4 | 90 | 3.8 | 77 | 3.6 | 214 |
| Contractual claims for own- ership, or damage to personal property (<i>e.g.</i> , bailments) | 2.0 | 38 | 1.3 | 27 | 0.8 | 17 | 1.4 | 82 |
| REAL PROPERTY | 21.4 | 401 | 15.4 | 313 | 10.9 | 221 | 15.8 | 935 |
| Disputes over ownership, rights of occupancy | 14.2 | 266 | 9.1 | 183 | 6.0 | 121 | 9.6 | 570 |
| Private land use—nuisance, water, mineral rights | 2.2 | 41 | 2.0 | 41 | 1.4 | 29 | 1.9 | 111 |
| Real estate contracts— specific performance, rescission | 2.2 | 41 | 2.3 | 47 | 1.5 | 30 | 2.0 | 118 |
| Landlord-tenant disputes | 1.5 | 29 | 1.2 | 25 | 1.2 | 24 | 1.3 | 78 |
| Damage, impairment of property | 1.3 | 24 | 0.8 | 17 | 0.8 | 17 | 1.0 | 58 |
| CORPORATIONS AND PARTNERSHIPS | 2.6 | 49 | 2.4 | 50 | 1.4 | 29 | 2.1 | 128 |
| Disputes over control, mis- management, stockholders' and creditors' rights, securities fraud | | | | | | | | |
| TORTS | 9.6 | 176 | 16.4 | 331 | 22.3 | 452 | 16.2 | 959 |
| Negligence—motor vehicle accidents | 0.1 | 1 | 2.9 | 59 | 7.5 | 152 | 3.6 | 212 |
| Negligence—railroad & streetcar accidents | 3.3 | 61 | 3.1 | 63 | 0.9 | 18 | 2.4 | 142 |
| Negligence—workplace accidents | 1.9 | 35 | 3.4 | 68 | 1.9 | 38 | 2.4 | 141 |
| Workmen's compensation | 0 | 0 | 2.8 | 56 | 6.4 | 129 | 3.1 | 185 |
| Negligence—misc. accidents | 1.2 | 22 | 1.9 | 38 | 2.3 | 47 | 1.8 | 107 |
| Misc. torts (malpractice, libel, false arrest, assault, unfair competition, etc.) | 3.1 | 57 | 2.3 | 47 | 3.3 | 68 | 2.9 | 172 |

| | 1870- 1900 | | 1905- 1935 | | 1940- 1970 | | All Periods | |
|--|---------------|------|---------------|------|---------------|------|-------------|------|
| | % | n* | % | n | % | n | % | n |
| CRIMINAL | 10.7 | 199 | 11.6 | 235 | 18.2 | 367 | 13.6 | 801 |
| Murder | 2.2 | 41 | 2.5 | 50 | 3.8 | 76 | 2.8 | 167 |
| Crimes against persons (rape, assault, child abuse, etc.) | 1.8 | 34 | 2.6 | 53 | 4.8 | 97 | 3.1 | 184 |
| Property crimes (theft, burglary, forgery, etc.) | 2.8 | 52 | 2.7 | 55 | 4.5 | 90 | 3.3 | 197 |
| Crimes against public moral- ity (liquor, narcotics, disorderly conduct) | 1.7 | 31 | 2.0 | 40 | 2.1 | 43 | 1.9 | 114 |
| Business regulation and license violations | 1.0 | 19 | 1.1 | 22 | 0.4 | 9 | 0.9 | 50 |
| Other (perjury, contempt, drunk driving, etc.) | 1.2 | 22 | 0.7 | 15 | 2.6 | 52 | 1.5 | 89 |
| PUBLIC LAW | 12.4 | 230 | 13.0 | 263 | 19.4 | 392 | 15.0 | 885 |
| Regulation of business and land use | 1.3 | 24 | 2.4 | 48 | 6.6 | 133 | 3.5 | 205 |
| Taxation | 4.2 | 78 | 3.9 | 79 | 4.8 | 96 | 4.3 | 253 |
| Condemnation, eminent domain | 1.8 | 33 | 1.4 | 28 | 1.5 | 31 | 1.6 | 92 |
| Elections and right to public office | 1.9 | 36 | 1.9 | 38 | 1.9 | 39 | 1.9 | 113 |
| Other government abuse of authority | 3.2 | 59 | 3.4 | 70 | 4.6 | 93 | 3.8 | 222 |
| FAMILY AND ESTATES | 7.7 | 144 | 9.7 | 196 | 11.8 | 237 | 9.8 | 577 |
| Divorce, child custody | 1.4 | 26 | 2.7 | 54 | 5.4 | 109 | 3.2 | 189 |
| Inheritance—wills, intestate succession | 4.3 | 81 | 6.0 | 121 | 5.4 | 108 | 5.3 | 310 |
| Estate administration | 2.0 | 37 | 1.0 | 21 | 1.0 | 20 | 1.3 | 78 |
| NOT KNOWN | 2.3 | 43 | 1.8 | 37 | 0.7 | 15 | 1.6 | 95 |
| Purely procedural issues on appeal, kind of underlying action not disclosed in report | | | | | | | | |
| TOTAL CASES IN SAMPLE | | 1872 | | 2016 | | 2016 | | 5904 |

* n=Number of cases in sample.

Figure 2
Percent of SSC Cases by Area of Law,
All States



* Includes contract, debt, corporations, and partnerships.

A. Area-by-Area Analysis

Table 1³⁵ summarizes the major areas of law for the whole sample of 5,904 cases, in all 16 states, broken down into 8 categories

35. The table describes the proportion of SSC caseloads devoted to each legal category, *averaging* the percentage distribution of the 16 SSCs, giving each case and state the same weight, regardless of interstate differences in caseload. For example, assume we were dealing with only two states, Illinois and Kansas. Of the 126 Illinois SSC cases sampled for 1870-1900 (18 each from 1870, 1875, . . . 1900), 8 were criminal (6.3%); for the Kansas SSC, 17 of 126 were criminal (13.5%). The total proportion of criminal cases shown on Table 1 would be 25/252 (10%), even though the Illinois SSC decided 2,784 cases in the sample years and the Kansas court only 1,412. If we *weighted* the average by volume, the total criminal percentage would be 8.7%. Overall, the differences between the averaging method and the weighting method are not so great as to affect the trends and interpretations offered in this paper. (To be precise, differences in the averaging method employed and the volume-weighted average method, tested for five major areas of law, ranged $\pm 6\%$, and the \pm -values testing significant differences ranged from 0.27 to 2.56 with 20 degrees of freedom.) Moreover, the averaging method, which levels the distortions produced by courts with extraordinarily high caseloads, is a more sensible way of portraying shifts in the *focus* of SSC agendas over time.

One could also weight cases by opinion pages. A 20-page court opinion in a criminal case might be considered a greater investment of court attention than a 3-page tort case. We

and 29 subcategories.³⁶ The Table also shows national trends over the century; the data have been collapsed into three time periods—1870-1900, 1905-1935 and 1940-1970.³⁷ Figure 2 shows this trend information more dramatically, in graphic form. The following paragraphs briefly discuss the major areas.

1. *Debt collection and contract cases.*

To most people, it might come as something of a surprise that debt collection matters occupied the SSCs' attention in the last century more than any other category of cases. They constituted 17.1 percent of all SSC cases. For the first 30 years of our survey period, 1870-1900, they constituted 25.8 percent of SSC caseloads.

One reason for the early prevalence of collection matters is that the cases were not as simple as one might think. Over a third involved parties other than the primary creditor and debtor—competing creditors, the debtor's sureties, court-appointed receivers, sheriffs, and sheriff's sureties. In over a third, the courts were asked

computed the proportion of SSC opinion pages devoted to each area of law, after correcting for different sizes of type in different reporters. Public law opinions tended to be slightly longer than average, debt collection and tort case opinions shorter (on the average by one-half page). Thus, if we weighted opinions by page length, the figures for public law cases would be slightly higher than shown in Table 1, torts and collection cases slightly lower, and criminal and property cases about the same. Nor would the page-length weighting affect, to any significant degree, the shape or magnitude of changes over time in area of law. On balance, we feel that the *averaging* method gives us an accurate and understandable method for displaying the way SSCs as a whole have divided their attention among different areas of law.

36. Although many of the sampled cases straddled several areas of law, each case was counted under no more than one category. The 77 cases in which the plaintiffs' claims were based on property law and also involved counterclaims or defenses based on family or inheritance law were counted under Real Property, but not under Family and Estates. We excluded from Real Property zoning cases (49 decisions, coded under Public Law), mortgage foreclosures (201, included in Debt Collection), real property tax (123) and condemnation cases (92) (both put under Public Law). Under Debt and Contract, we did not include cases on performance of real estate contracts (118, under Real Property), suits based on partnership and stock sale agreements (27, put under Corporations and Partnerships), and real property lease cases (78). Excluded from Torts totals were debt collection and estates cases involving claims of fraud (193), and charges of fraud or trespass in real estate disputes (104). Constitutional law cases that began as other kinds of cases, such as criminal cases, were not counted under Public Law. See notes 58 & 66 *infra*.

If all of these "marginal" or "borderline" cases (totaling over 1,000) had been counted twice, that is, included in *both* categories to which they plausibly belonged, slight changes in the overall distribution of cases shown in Table 1 would result. The 100-year totals for Family and Estates would dip from 9.8% of all cases to 9.65%, Real Property would increase from 15.8% to 19%, Debt and Contract from 25.8% to 26.2%, Torts from 16.2% to 17.6%. Criminal cases would slip from 13.6% to 11.2%, Public Law from 15% to 14.2%, and Corporations and Partnerships would stay unchanged at 2.1% of all cases.

37. With the exception of one category (Estates), variation across time is much greater than variation across states; in other words, *national* trends are quite strong and represent useful summary measures of the 16 different state trends.

not merely to adjudicate the validity or amount of a debt, but to regulate the troublesome situation in which a debtor's property is seized and sold to satisfy the debt. There were cases growing out of efforts to recover property allegedly transferred to evade creditors, or claims that the sheriff had seized property exempt from execution under debtor-protection laws, or that the sheriff himself had defrauded the creditor or the debtor. Failed businesses and banks, claims under workmen's liens, crop mortgages and state insolvency laws provided other rich harvests of cases.³⁸ These early debt collection cases thus reflected the primitive state of the credit system, the lack of modern banking institutions and the general insecurity of investments. They turned on surety agreements and on complex rules for adjusting competing claims of creditors in a society where business failure was a constant presence.

As striking as the massive role of collection cases between 1870 and 1940, is the decline of such cases in the last 40 years. The decline has been surprisingly uniform across the country, independent of court structure and degree of SSC discretion, and regardless of differences in state economies.³⁹ This decline runs parallel to a decline in the rate of failures and defaults, both personal and business, that underlay so many of the earlier collection cases. As Figure 3 indicates, the proportion of debt cases in the SSCs has followed closely the national rate of business failures.⁴⁰ It is only in the period since 1940, a period of sustained prosperity and steadily rising land values, that collection cases have faded from SSC dockets. But institutional and legal changes also have been at work "firming up" the instruments and instrumentalities of credit, improving the general level of security for business ventures. In the 1930's, the federal government began to insure bank deposits and mortgages on both

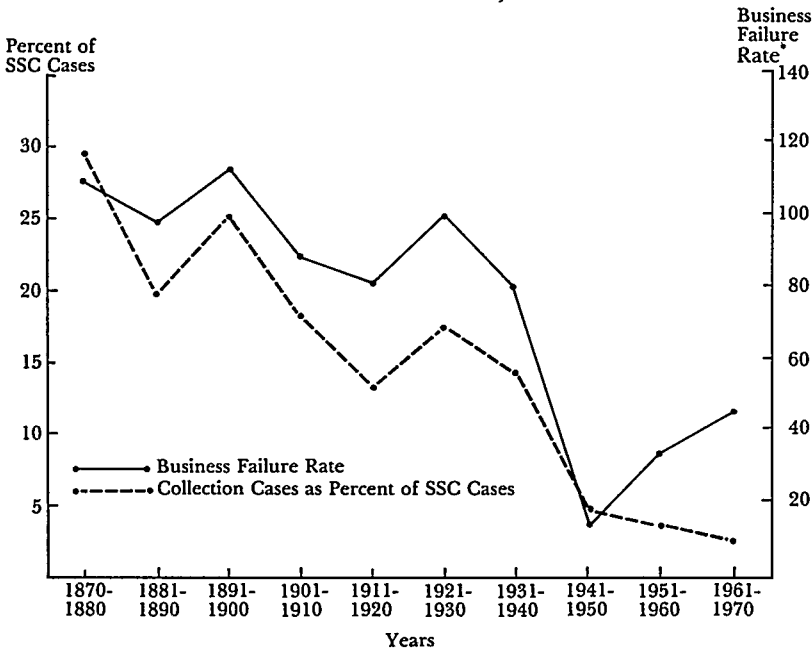
38. To break the debt actions down according to the type of obligation or security involved, about 30% involved debts incurred through sales or credit arrangements, 20% real estate mortgages, 25% promissory notes or loans not secured by mortgages, and 25% miscellaneous or unreported obligations.

39. Debt cases declined from an average of 18.8% for SSCs in 1905-1935 to 7.5% in 1940-1970. The decline was even sharper in some states. The Illinois Supreme Court, for example, had no debt cases out of the 126 sampled in the 1940-1970 period. The proportion of debt cases sank to 1.6% of the sampled cases in Tennessee and North Carolina. In South Dakota, it went from 29% in 1905-1935 to 4.8% in 1940-1970. Only in Rhode Island was the decline in collection cases slight—from 18% in 1905-1935 to 15% in 1940-1970.

40. While the depression decades of the 1870's and 1890's saw the highest levels of collection cases on SSC dockets (28.7% of all cases in 1870, 1875 and 1880; 21.4% in 1885 and 1890), debt cases actually declined as a proportion of SSC cases during the depression in the 1930's (19.8% in 1930, 18.8% in 1935 and 14.9% in 1940). One reason may be that the overall business failure rate actually fell off sharply in that decade after the explosion of failures in 1931 and 1932.

farms and homes. Insurance companies increasingly have replaced private sureties, and lending transactions have been handled, more and more, through standardized, "litigation proof" contracts and security arrangements instituted by large businesses.⁴¹

Figure 3
Business Failure Rate and Collection Cases
as Percent of SSC Cases, All States



* Source: U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS 912-13 (1975). The business failure rate is the number of failures per 10,000 enterprises listed by Dun & Bradstreet, Inc. *Id.* at 913 n.2. In Figure 3, this rate, which has been reported for each year, is averaged over the decade; SSC cases are averaged for the sample years in same time period. Thus the first point on the solid line is business failures for 1870-1880 (average), and the first point on the broken line is the average percent SSC collection cases for 1870, 1875 and 1880; the second point on the solid line is business failures for 1881-1890, and the second point on the broken line is the percent SSC collection cases for 1885 and 1890; and so on.

Contract cases other than debt collection matters were also a considerable presence on SSC dockets (8.2 percent of all cases in our sample), but they followed a different and less dramatic course over

41. The enactment of the Federal Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (current version at 11 U.S.C. §§ 1-1200 (1970 & Supp. V 1975)), undoubtedly drew some collection cases out of the state courts. Nevertheless, there was no significant absolute decline in SSC cases involving state insolvency laws until the 1930's. See generally C. WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935). On the earlier periods, see P. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* (1974).

time.⁴² Disputes over insurance contracts and employment contracts have not joined collection cases in decline.⁴³ Disputes over the validity and performance of contracts for goods and services—for example, buyers' claims of breach of warranty or other inadequate performance—peaked later than debt collection cases (at 6.2 percent of all cases in 1915-1920) but also declined in recent years to 2.9 percent of SSC cases in 1940-1970.

2. *Real property.*

In the late 19th century, real property⁴⁴ cases were second only to debt collection problems on SSC dockets, constituting over 21 percent of all cases in 1870-1900. In view of the primary importance of land as a form of wealth, this is hardly surprising. The largest subcategory of real estate cases was disputes over ownership or title to land: actions of ejectment, adverse possession, actions to quiet title, challenges to the validity of prior conveyances or grants of public land. In 1885-1900, title disputes alone were 15.4 percent of all SSC cases.

In this century, however, the incidence of all property cases on SSC agendas steadily declined to 11 percent in the 1940-1970 period; title disputes fell to 6 percent.⁴⁵ Certainly the number, rate and value of real estate *transactions* have not declined. But many of the factors that produced litigation over property ownership undoubtedly have changed, as title insurance spread, as procedures for transferring and recording titles were standardized and as problems involving occupancy of and title to public lands declined.

Other classes of cases in the Real Property category declined less sharply. Landlord-tenant disputes have remained a relatively steady

42. For an analysis of the flow of contract cases through a single SSC (Wisconsin), see L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965).

43. Insurance contract cases constituted 1.4% of the SSC caseload in 1870-1900, 3.1% in 1905-1935 and 2.7% in 1940-1970. Employment contract cases were 0.6%, 1.1% and 0.9% in the same periods. The employment contract totals do not include cases involving disputes over hiring, dismissal, promotions, salaries, and benefits of government employees; those cases, which generally turn on statutes rather than contracts, were included under the Public Law category. They constituted 0.8% of SSC dockets in 1870-1900, 0.8% in 1905-1935 and 1.5% in 1940-1970. See note 36 *supra*.

44. Our Real Property category excludes mortgage foreclosure cases (grouped with other debt collection matters), as well as condemnation, real estate tax and land use zoning cases (all classified under Public Law). See note 36 *supra*.

45. There was a slight resurgence of title disputes and other real estate cases in the 1950's, a period of intense real estate development. Title disputes then were over 7% of SSC cases, up from 4.8% in 1935-1940. Real estate cases of all kinds were 16.3% of SSC cases in 1955, and if regulatory land use cases—appeals from zoning boards—had been included, see note 44 *supra*, the 1955 total would have been over 18%. But by 1970, real estate cases, including zoning, were down to 10%.

and surprisingly small 1-2 percent of SSC cases through the entire period, even in states with large cities.⁴⁶ Disputes over the performance of real estate contracts—rescission, specific performance, damages for nonperformance, payment of brokers' fees—show no clear trend over time. Disputes over land use—actions to abate nuisances, conflicts over water, mining and logging rights—were most significant in Western states such as California and Oregon in 1870-1900, and Idaho and Nevada in 1900-1930.

Regulatory land use cases, primarily zoning, have increased. There were almost none before 1940; in 1955-1970, they made up 2.4 percent of all SSC cases. The rise has been insignificant in some states, but in others—Michigan, New Jersey, North Carolina, and especially Rhode Island, where zoning cases were 9 percent of the SSCs' cases in 1940-1970—the increase has been sharp. In general, however, the growth of regulatory land use cases does not come close to offsetting the decline in common law property cases.

3. *Corporations and partnerships.*

One of the most striking economic trends of the last 100 years has been the rise of the business corporation to dominance in the economy and the equally relentless rise of corporate work as a staple of lawyers' efforts—on Wall Street and elsewhere.⁴⁷ Nevertheless, corporation law cases have accounted for only a tiny slice of SSC business: 2.1 percent of all cases over the whole century and a mere 1.4 percent in 1940-1970.⁴⁸ Corporations and partnerships, of course, were litigants in many additional SSC cases that had no issues of corporation and partnership law *per se*—ordinary debt collection, property, tort, and regulatory cases, for example. About 20-25 percent of litigants in SSC cases were business organizations, as opposed to individuals, sole proprietors or government entities.⁴⁹

46. Landlord-tenant cases include disputes over rural and commercial land, as well as residential property.

47. For a polemical but interesting account of the rise of the corporate law firm, see J. AUERBACH, *UNEQUAL JUSTICE* 14-73 (1976).

48. Variations by state have been small. The rate for the SSC in New Jersey—a state, like Delaware, known for its unrestrictive corporation law and the charter state for many major corporations—was only slightly higher than average in corporation law cases: 4% of all cases in 1870-1970. The largest concentration of corporation cases for the courts in our sample was California in the 1870-1900 period, where they amounted to 6% of the court's agenda.

49. The percentage of cases involving corporate litigants is stated as a *range* because insurance companies, the real litigating parties in many modern tort cases, are not so identified in the court opinions and were not coded as such. However, even if we assume that every sampled tort case between 1940 and 1970 had one insurance company as a party, we would raise the coded total of corporate litigants by only 5%.

But the proportion of SSC cases in which business organizations have been parties has not increased in the last 50 years. And there have been relatively few SSC cases of the kind that fill up the thick law school casebooks on the internal affairs, powers and special liabilities of corporations. Most of the cases have been stockholder suits claiming mismanagement or self-dealing by officers or directors of closely held corporations, fraud in the sale of securities, or corporate liability for acts of agents or subsidiaries.

The paucity of classic corporation-law matters does not mean, of course, that the SSCs did not play an important role in interpreting broadly worded corporation statutes and developing the law of corporate powers and liabilities.⁵⁰ A few significant precedents can go a long way, especially in a field closely watched and intensively written about by lawyers. Nevertheless, the elaboration of corporation law was certainly not a major focus of the work of the highest state courts. To some extent, such cases may gravitate toward federal courts under diversity jurisdiction or toward federal administrative agencies.⁵¹ But we suspect that the principal reason is that the living law of business organizations has been molded predominantly by informal negotiations in board rooms and lawyers' offices.⁵²

4. *Torts.*

As debt collection and property cases faded from their prominent place on SSC agendas over the past 50 years, their position has been taken by tort, criminal and public law cases, and to some extent, by family law matters. Tort cases were the first to rise to prominence, growing from 5.7 percent of SSC cases in 1870-1880 to 16.4 percent in the 1905-1935 period. They have continued to increase in the post-World War II period, but more slowly and erratically, to 22.3 percent for the 1940-1970 period, and 23.3 percent of SSC cases in 1970.

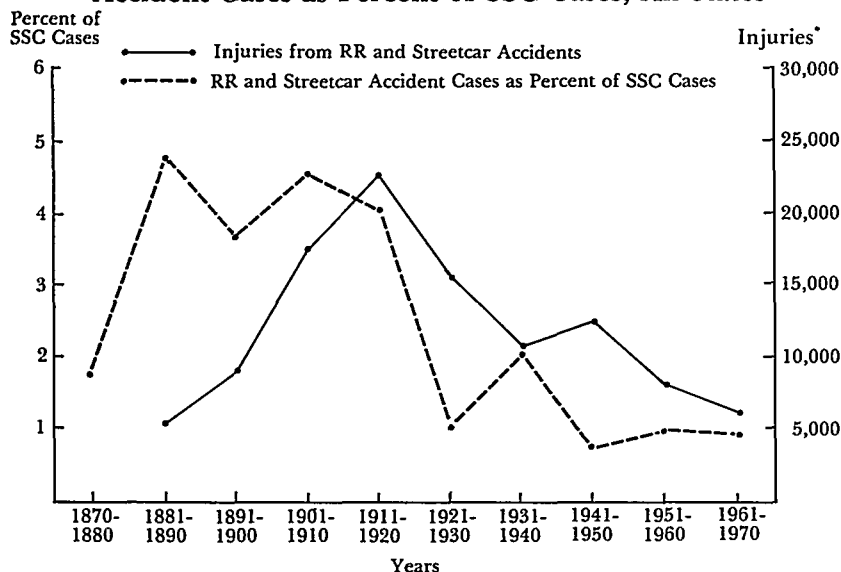
50. See J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, at 123-30 (1970).

51. A good deal of law regulating internal corporate affairs and mergers is administered, of course, by federal agencies, including the Securities and Exchange Commission, the Federal Trade Commission, the Antitrust Division of the Department of Justice, the Internal Revenue Service, and industry-specific agencies such as the Interstate Commerce Commission. Nevertheless, there were relatively few securities fraud cases in the SSCs even *before* the SEC was established in 1934.

52. On the propensity of larger business corporations to seek to avoid litigation, see Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

Figure 4

Number of RR and Streetcar Injuries and RR and Streetcar
Accident Cases as Percent of SSC Cases, All States



* Source: U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 739-40 (1975).

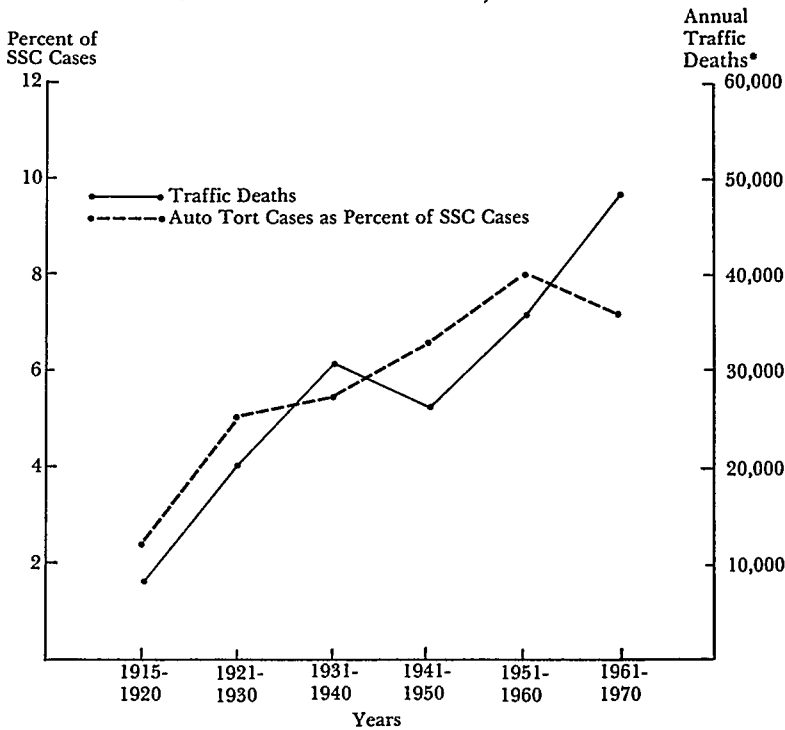
The overwhelming majority of tort cases have been personal injury suits. For the first 50 years of our period, the main culprit was the railroad. From 1885 to 1920, one-third of all tort suits on SSC dockets, and 4 percent of all SSC cases, were lawsuits arising out of railroad and streetcar accidents. The suits began to decline in the 1920's, along with railroad accidents themselves, as shown in Figure 4.⁵³ But by that time, railroad accident appeals were already being replaced—and more than replaced—by automobile accident cases, which rose as rapidly as the number of serious accidents on the highways. From 2.1 percent of all SSC cases in 1915-1920, motor vehicle accident cases grew to 7.6 percent (one-third of all tort cases) in 1940-1960. Their high points were 8.7 percent of all SSC cases in

53. Both the figures on railroad tort cases and the data on accidents in Figure 5 and the text exclude injuries to railroad employees. Accident cases involving railroad employees have been coded under our Work Place Accident category. See note 55 *infra* and accompanying text.

In Figure 4, the points along the RR and Streetcar Accident curve are based on an average of SSC data from the 2 (and in the first case, 3) sample years that fall within the paired dates arranged along the horizontal axis. Thus, railroad and streetcar tort cases averaged 1.8% of SSC cases in the sample years 1870, 1875 and 1880, then 4.7% for the sample years 1885 and 1890, and so on through 0.9% in 1965 and 1970. The Injuries from RR and Streetcar

1950 and 9 percent in 1970. Even so, as Figure 5 indicates,⁵⁴ in the 1960's, motor vehicle tort cases in the SSCs did not keep pace with the ever-mounting numbers of highway deaths, perhaps because more SSCs were gaining discretion to choose their cases during that time.

Figure 5
Traffic Deaths and Auto Accident Tort Cases
as Percent of SSC Cases, All States



* Source: U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 720 (1975).

Workplace accidents also have been an important component of SSC caseloads. Common law negligence suits for workplace injuries contributed almost 2 percent of SSC cases in 1870-1900 and rose to more than 5 percent over the 1905-1920 period.⁵⁵ Workmen's com-

Accident curve consists of points that average the annual injury figures for all years covered by the paired dates on the horizontal axis.

54. In Figure 5, the points along the Auto Tort curve are based on an average of SSC data from the 2 sample years that fall within the paired dates arranged along the horizontal axis. See note 53 *supra*. The Traffic Death points are based on an average of the *annual* figures covered by the paired dates in the horizontal axis.

55. The passage in 1908 of the Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (current version at 45 U.S.C. §§ 51-60 (1970)), a federal statute governing liability of

pensation, designed to divert such claims into administrative tribunals, then replaced the common law system.⁵⁶ The new system did succeed in curbing litigation and providing more certain, though limited, recovery. But appeals from workmen's compensation cases became an important part of the work of SSCs after 1920: 4.5 percent of all cases in 1925-1930, 6.4 percent in 1945-1950, and 8 percent in 1970.⁵⁷

Other kinds of tort cases, despite their prominence in law school casebooks, have appeared relatively infrequently in SSC dockets. Products liability and malpractice cases have increased in recent years, but they still amounted to only 1.6 percent of SSC cases in 1955-1970 (up from an average of 0.5 percent from 1920 to 1950). Defamation cases (libel and slander) averaged a mere 0.4 percent of SSC cases; they never exceeded 1 percent for any decade. Malicious prosecution and false arrest cases accounted for only 0.5 percent of SSC cases. Unfair competition cases were exceedingly rare.⁵⁸

5. Criminal law.

The proportion of criminal cases on SSC dockets has risen even more dramatically than that of tort cases, especially in recent years. Figure 6 illustrates the suddenness and extent of the change.⁵⁹

railroads for accidents to *employees*, may have affected the number of workplace accident cases in which the workplace was a railroad. FELA established concurrent federal and state court jurisdiction. By limiting employers' defenses, it both encouraged claims and simplified doctrine. For a quantitative study of accident cases, see Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

56. See NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION Part II (1973); Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

57. A few states contributed disproportionately to the number of workmen's compensation cases. The Tennessee Supreme Court had twice the mean (14% of its cases in 1940-1970, as compared to a 16-state mean of about 7%), and West Virginia and Rhode Island were also quite high (11.9% and 11.3% respectively). The Nevada Supreme Court, on the other hand, had only 1 workmen's compensation case in the 126-case sample for 1940-1970, while Alabama had only 2. In general, there was more interstate variation in the incidence of tort cases than of commercial, property or estates cases.

We have not included a graph plotting the relationship between workplace accident cases in the SSCs and workplace accidents in society because reliable national data concerning work accidents *over time* were not readily available.

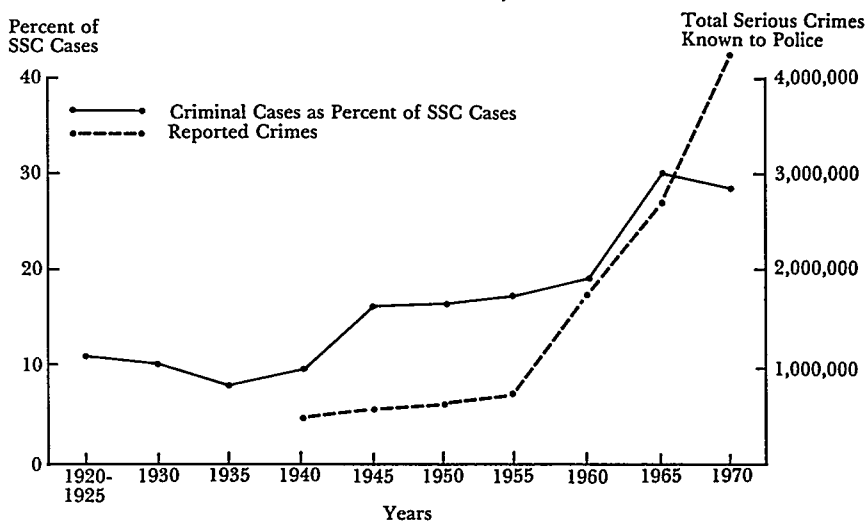
58. SSCs decided a good many cases that involved claims of fraud and deceit or conversion, and that therefore "sounded" in tort in a formal sense. But we coded most of these cases under Debt Collection, Sales Contract or Corporate Securities categories because those headings seemed to capture the nature of the cases more meaningfully. These "fraud and deceit" cases amounted to almost 4% of SSC cases. In addition, cases of trespass or damage to real property, which often sounded in tort (amounting to 1% of SSC cases), were put under the Real Property category.

59. The Total Serious Crime Known to Police curve in Figure 6 is based on FBI statistics.

Criminal law cases were 9-10 percent of SSC business in the 1930's, 14-17 percent in the 1945-1960 period, and a startling 28 percent in 1965 and 1970. All major subcategories of criminal cases shared in this increase. Murder cases, which were 3.3 percent of all SSC cases in 1870-1880 and 1.7 percent in 1935-1940, rose dramatically to 6 percent in 1965. Other violent crimes against persons (manslaughter, rape, assault, and robbery) jumped from 2.1 percent of SSC cases in 1935-1940 to 9 percent in 1965-1970. Property crimes (burglary, larceny, forgery, and embezzlement) went from 2.8 percent in 1925-1940, to 4 percent in the 1950's, and 6.8 percent in 1965-1970. Large increases occurred also in cases involving gambling, narcotics, drunk driving, and other crimes against public order and morality (prostitution, pornography and disorderly conduct); the combined total of these cases grew from 1.8 percent of SSC business in 1935-1940 to 5.5 percent in 1965-1970.⁶⁰

Figure 6

Reported Crime Totals and Criminal Cases as
Percent of SSC Cases, All States



See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS*, vols. XI-XXVII (1940-1957); U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES* 413 (1975). The total includes only the seven major crime categories covered by the FBI Index: murder, rape, manslaughter, robbery, bribery, larceny, and auto theft. These data are not reported for the period before 1936. The data points along the Reported Crimes curve represent an average of reported crime totals for the 5 years ending in the dates on the horizontal axis, e.g., 1936-1940, 1941-1945. The Criminal Cases as % SSC Cases curve is based on data for the single sample years along the horizontal axis, except that the first point averages the data for sample years 1920 and 1925.

60. A few minor classes of criminal cases have *not* increased on SSC dockets in the last decades. Liquor prohibition and regulation prosecutions, which combined to produce almost

As Figure 6 suggests, the rise in SSC criminal cases in the 1960's was associated with a sharp rise in reported crime, and perhaps in crime itself as a social phenomenon.⁶¹ But the vast upsurge in SSC criminal cases is undoubtedly attributable to changes in legal doctrine and practice as well, particularly the "due process revolution" of the late 1950's and the 1960's. The Warren Court's extension of criminal defendants' constitutional rights—including rights to free counsel—facilitated and encouraged criminal appeals and post-conviction relief applications.⁶² In fact, criminal cases with constitutional issues account for 73.5 percent of the increase in SSC criminal cases between 1960 and 1965-1970. In 1965-1970, almost *one-half* of all criminal cases before the SSCs included constitutional issues, compared to an average 18.5 percent of criminal cases over the 1870-1950 period and 25.9 percent as recently as 1955-1960.⁶³

The Warren Court doctrines cut across all states, and so did the crime explosion, to a degree. But the SSCs in different states have not experienced an equal increase in criminal cases. Other factors clearly have been at work. Table 2 shows increases in the percentage of criminal cases, the frequency of constitutional issues and the percentage of prodefendant rulings for each state in our study over the 1940-1970 period. The precise causes of interstate differences are unclear. Among states relatively low in urbanization and crime

2% of SSC cases from 1885 to 1930, almost totally disappeared from SSC agendas after World War II. Other regulatory or license-violation criminal cases, such as violations of building codes and fish and game laws, have not increased. Crimes against the legal system (perjury, contempt, etc.) were 0.9% of SSC cases in 1935-1940, 1.7% in 1955-1960 and 1.4% in 1965-1970.

61. There are, to be sure, grave problems with the precision of FBI crime statistics as an index of the total amount of crime, and some apparent increases in crime may reflect changes in reporting practices of citizens and the police. See generally U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 18-31 (1967); Wheeler, *Criminal Statistics: A Reformulation of the Problem*, 58 J. CRIM. L.C. & P.S. 317 (1967). Some, perhaps most, of the increase in reported crime from the 1951-1955 period to the 1956-1960 period may be due to a change in the categories used in the FBI statistics, from "Total Urban Crime" (the designation for 1936-1955) to "Total U.S. Crime" (the designation for 1956-1970). But there can be little doubt that there was actually a significant increase in crime in the 1960's, along with intensified *perception* of crime as a serious social problem. See J. WILSON, *THINKING ABOUT CRIME* (1975).

62. The major "due process" decisions of that era include *Miranda v. Arizona*, 384 U.S. 436 (1966) (privilege against self-incrimination extended); *Fay v. Noia*, 372 U.S. 391 (1963) (federal habeas corpus extended); *Douglas v. California*, 372 U.S. 353 (1963) (defendant entitled to counsel in state criminal appeals as of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in state criminal trials for felonies); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of illegally obtained evidence in state criminal proceedings); *Griffin v. Illinois*, 351 U.S. 12 (1956) (free transcripts or equivalent for indigents in state criminal appeals).

63. Almost 13% of all SSC cases in 1965-70 involved the constitutional rights of criminal defendants, as compared with an average of 3% from 1935-1950.

rates, some SSCs (Idaho, Minnesota, Oregon, West Virginia) had small increases in criminal cases or ended up with comparatively light criminal caseloads. Others, however, (Kansas, Maine, North Carolina, South Dakota) had sharp increases and relatively high proportions of criminal matters. The states with big cities and high crime rates were also variable. The California and Illinois SSCs devoted about 30 percent of their caseload to criminal cases, while the Michigan and New Jersey courts had less than half that percentage.

Table 2

Criminal Cases as Percent of All SSC Cases, 1940-1970

| SSC | Percent Criminal Cases 1940-1970 | Percent Increase Over 1905-1935 | Percent Criminal Cases With Procedural Due Process Issues 1940-1970 | Percent Criminal Cases Decided in Favor of Criminal Defendants 1940-1970 |
|----------------------|--|---------------------------------------|--|---|
| Illinois | 31.0 | 44 | 33.3 | 15.8 |
| California | 27.8 | 133 | 54.3 | 56.7 |
| Nevada | 25.4 | 14 | 25.0 | 19.3 |
| Maine | 24.6 | 210 | 32.3 | 26.7 |
| Tennessee | 23.8 | 43 | 20.0 | 41.4 |
| North Carolina | 23.0 | 107 | 6.9 | 27.5 |
| South Dakota | 18.3 | 64 | 26.1 | 36.3 |
| Kansas | 17.5 | 57 | 18.2 | 4.5 |
| New Jersey | 15.1 | 111 | 42.1 | 36.8 |
| Rhode Island | 15.1 | 138 | 26.3 | 61.2 |
| West Virginia | 15.1 | 19 | 52.6 | 56.3 |
| Alabama | 11.9 | 25 | 6.7 | 35.7 |
| Michigan | 11.9 | 0 | 66.7 | 64.3 |
| Idaho | 11.1 | -18 | 21.4 | 28.6 |
| Minnesota | 10.3 | 86 | 30.8 | 30.8 |
| Oregon | 9.5 | 50 | 25.0 | 33.3 |
| Average of All 16 | 18.2 | 56* | 30.8 | 33.9 |

* This figure is the average percentage increase in *total* criminal caseload between sample years for the 16 sampled states.

Differences in the growth of criminal caseloads are not clearly attributable to structural differences, such as the presence or absence of SSC discretion to select among petitions for review of criminal cases. The California and New Jersey SSCs, which exercised considerable discretion over criminal appeals, had large percentage increases. But some SSCs without discretion, such as Maine and Rhode Island, also experienced substantial increases, while

other states with discretion (Michigan and West Virginia) did not. It does appear, however, that the SSCs with more discretion to select criminal cases—California, Michigan, New Jersey, West Virginia—had particularly high percentages of “due process” constitutional issues in their criminal caseload.

Nor can we explain interstate differences in criminal caseloads in terms of the defendants’ actual chances of winning. For example, 3 of the 6 SSCs that *least often* favored criminal defendants on appeal (less than 30 percent of cases)—Kansas, Maine and North Carolina—nevertheless attracted substantial numbers of criminal appeals, increasing their caseloads 50 percent or more. The other 3 SSCs that were hardest on defendants—Idaho, Illinois and Nevada—had smaller-than-average increases, as one might have expected, but Illinois and Nevada continued to attract very high absolute levels of criminal appeals.⁶⁴ Of course, judicial attitudes—signals given off in opinions, turns of doctrine, and the like—in fact may be affecting the number and kind of criminal appeals to the SSCs. But the gross outcome measures we used cannot capture such subtleties. Another possible factor that our figures do not reach is the influence of legal help available to people convicted of crime.

6. *Public Law.*

We have grouped cases on the propriety of governmental action under the general heading of Public Law. This category shows a steady, if unspectacular, rise on SSC agendas. Here we have tax cases (the largest subcategory);⁶⁵ cases of business and public utility regulation, professional licensing, zoning, condemnation, and eminent domain; disputes over elections and appointment to public office (a surprisingly large and persistent 1.9 percent of all SSC cases); claims to government benefits (schooling, welfare, pensions, or irrigation rights, for example); and those miscellaneous claims against government that were not coded under other areas of law.⁶⁶

64. The strongest correlation with the outcome variable is court discretion. The SSCs with the most discretion to accept or reject criminal appeals—California, Michigan, New Jersey, West Virginia—had among the highest rates of decisions favoring criminal defendants. This correlation might be expected, given the capacity of these four SSCs to screen out unmeritorious appeals. Nevertheless, neither the structural fact of discretion nor the pro-defendant decision rate explains the great differences in size and growth of criminal caseloads among the four states.

65. The Tax subcategory included 132 real property tax cases, 96 cases involving income, excise, inheritance or corporation taxes, and 25 disputes between different governmental units over revenues or jurisdiction to tax.

66. For example, appeals from workmen’s compensation boards were included in the

The Public Law category grew from 12.7 percent of SSC cases in the 1870-1935 period to 19.5 percent in 1940-1970. The only sharp increase involved cases on business regulation, which jumped from 2.4 percent of SSC cases in 1905-1935 to over 7 percent in the 1955-1970 period.

Some types of claims against government, though currently quite visible, have not been important *quantitatively* in the work of the SSCs. Charges of abuses by welfare agencies, prisons or mental hospitals have made up only a miniscule portion of SSC cases. Free speech and race discrimination cases also have been rare. Somewhat more frequent were what we might call cases of substantive due process, in which litigants attacked the validity of tax or regulatory laws on the grounds that the laws unreasonably interfered with liberty or property rights.⁶⁷ Surprisingly, these substantive due process issues were just as common in the 1940-1970 period (10 percent of tax and regulatory cases, 1.2 percent of all SSC cases) as they were in 1870-1900 and 1905-1935.

Many public law cases turned on provisions peculiar to state constitutions—clauses about taxes and revenue, the structure and powers of local government, the composition and procedures of the legislature, or the jurisdiction and tenure of judges. These state constitutional issues have not declined over time. They comprised approximately 15-20 percent of public law cases and 4.1 percent of all SSC cases in each of the three major time divisions (1870-1900, 1905-1935, 1940-1970). In 1870-1900, these state constitutional issues made up the majority (51 percent) of all constitutional issues brought before SSCs. They declined to 28 percent of constitutional issues in 1940-1970, and to 18 percent in 1960-1970, primarily due to the recent explosive rise in cases on the procedural due process rights of criminal defendants.⁶⁸

7. *Family and Estates.*

Over the last century, American society has grown wealthier, and a greater number of decedents have left substantial estates. Appeals

Workmen's Compensation subcategory in the Torts classification, and charges of misconduct by sheriffs in execution of judgments were included in the Debt Collection totals. On the other hand, included in the miscellaneous Public Law category were cases charging wrongful remuneration of government employees (62), wrongful issuance of bonds (26) and many claims of *ultra vires* action by municipal and county officials (98).

67. See generally Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 226 (1958); Paulson, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

68. See notes 62-63 *supra* and accompanying text.

in estate matters have not increased, however. They have occupied a steady 6-7 percent of the work of SSCs in almost every decade until the 1960's, when they declined to 4 percent.

There was a slight increase over time in the largest subcategory of estate cases—inheritance claims, that is, contests over the validity and interpretation of wills or the application of intestate succession or dower statutes. These inheritance cases alone rose gradually from 5.4 percent of 1870-1880 SSC cases to 7.9 percent in 1945-1955 before declining to 3.2 percent in 1960-1970. The other major category of estate cases, however—disputes over estate administration, such as alleged self-dealing by executors—declined throughout the 20th century, averaging less than 1 percent of SSC dockets in the last 30 years.⁶⁹ A number of factors may explain why estates cases have not increased their share of SSC workload. The art of avoiding litigation through estate planning and professional estate administration has probably improved, at least for the rich. For the less rich, it has become more and more costly to pursue frustrated hopes of an inheritance all the way to the SSC. And the growing number of SSCs with discretion to select cases may well look down on estates cases as lacking policy issues and hence less deserving of an additional appellate review.

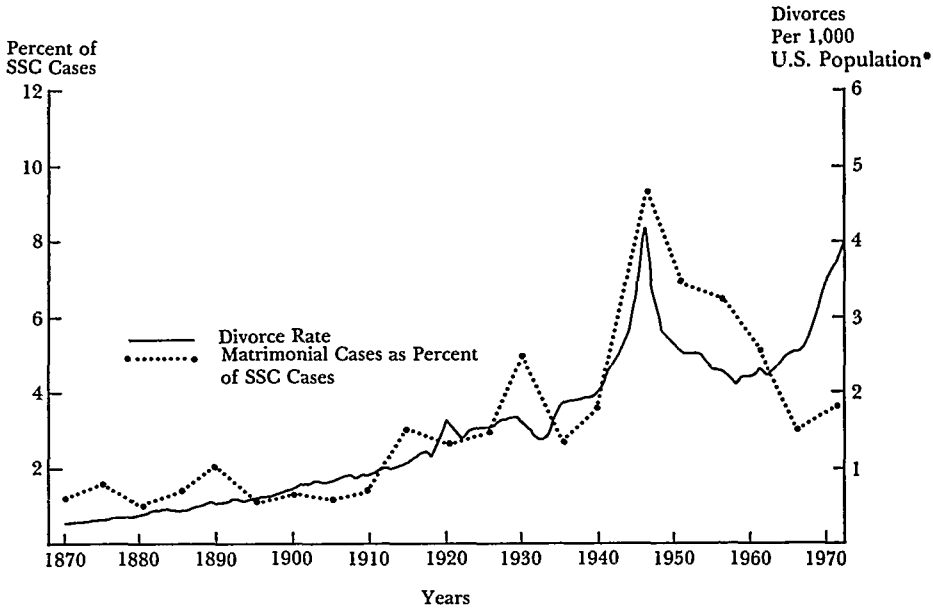
On the other hand, family law cases—primarily suits for divorce, alimony, child support and custody—increased from a tiny 1.3 percent of SSC cases in 1870-1900 to 2.7 percent in 1905-1935 and a substantial 9.4 percent in 1945. Since then, they too have declined somewhat, averaging about 5 percent of SSC cases in the 1950-1970 period. Almost every state participated in the increase in family law cases that began during World War II. Nevada, the country's leading divorce mill for most of the 20th century,⁷⁰ had the largest percentage of family law cases (8.7 percent of SSC cases in 1905-1935; 9.5 percent in 1940-1970), but in the past 30 years its lead has been slight. As Figure 7 shows, the curve for divorce litigation in the SSCs generally tracks closely the nationwide divorce rate. The divorce rate in turn has been sensitive, to a large extent, to the gradual liberalization of the law of divorce.⁷¹

69. Contractual or tort claims against an estate based on agreements or delicts of decedent while living were coded as contract or tort cases, with one exception: The 20 cases brought by persons who cared for decedents in their old age, claiming a promise to be paid for the care by a bequest or devise, were coded as inheritance cases.

70. N. BLAKE, *THE ROAD TO RENO* 152-72 (1962); Friedman & Percival, *Who Sues for Divorce?*, 5 J. LEGAL STUD. 61 (1976).

71. See Friedman & Percival, *supra* note 70.

Figure 7
National Divorce Rate and Matrimonial Cases as
Percent of SSC Cases



* Sources: U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS (continuous service, various numbers); U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE AND LABOR, MARRIAGE AND DIVORCE 1867-1906, pt. I, at 14 (1909); U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, MARRIAGE AND DIVORCE 1931, at 14 (1932); 3 U.S. PUBLIC HEALTH SERVICE, DEP'T OF HEALTH, EDUCATION AND WELFARE, VITAL STATISTICS OF THE UNITED STATES 1965, at 2-5 (1968).

B. *Sources of Change: A Preliminary View*

Our study of SSC agendas over the past 100 years shows a marked shift toward noncommercial cases. Debt collection and real property transaction matters, which once loomed large on SSC dockets and remained the largest categories up through 1930, have declined considerably in every state. Tort, criminal, family law, and public law cases have increased. These *growing* categories have one element in common: They are not disputes that arise out of private, voluntary business relationships. Neither a divorce nor a car crash, neither a license revocation nor a robbery, is a commercial transaction in the usual sense of the phrase. SSCs once elaborated and stabilized the private law of credit, commercial transactions and land ownership; they now fasten their eyes more on cases of personal injury, government engineering of the economy, human rights, and crime and punishment. Of course, these cases are not necessarily

noneconomic. Alimony is money; embezzlement is money; government regulation is usually a matter of money. Still, there are real, palpable differences between the market transactions and debt collection cases of the late 19th-century SSCs and the cases that predominate today.

No single variable can account for these changes in SSC agendas. The evidence suggests that socioeconomic factors are important, but so are structural and doctrinal factors that are more specific to the world of legal institutions and less responsive to short-run changes in outside forces. Several socioeconomic developments clearly correlate with changes in SSC workloads. The automotive society is reflected in the rise of personal-injury cases stemming from automobile accidents.⁷² The number of debt-collection cases in SSCs has been sensitive to the rate of business failures and, in the last 30 years, to economic and institutional changes that have put credit on a sounder, less volatile footing.⁷³ The rising crime rate and concern about crime in the 1960's have contributed to the bulge of criminal cases.⁷⁴

These parallels suggest that the SSCs are by no means functionally autonomous. The cases that reach SSCs pass through a rather refined and elaborate set of procedural and structural filters; yet these courts do not and cannot act independent of the social circumstances that produce litigation in the lower courts. Even that tiny proportion of litigation that reaches SSCs reflects social and economic change; the legal system, even at the apex of the judicial system, must reflect what is going on in society.

So much is almost self-evident. But there also have been enormous socioeconomic changes that seem to have had little or no impact on SSC dockets. A tremendously expanded corporate economy has not led to more cases dealing with the law of business associations.⁷⁵ Few SSC cases deal with computers, airplanes, frozen foods, or other stars of our new technology. Urbanization has not brought with it a flood of landlord-tenant cases.⁷⁶ Consumer credit has grown to the point where some people foresee a cashless society, but credit and banking disputes are dim figures in the SSCs of the 1960's. SSC dockets have reflected only vaguely the dramatic rise of the welfare state; education is a leading American industry, yet cases

72. See Figure 5 *supra*.

73. See notes 40-41 *supra* and accompanying text.

74. See note 61 *supra* and accompanying text.

75. See notes 48-52 *supra* and accompanying text.

76. See note 46 *supra* and accompanying text.

involving schools have played only a walk-on role in the SSCs. These cleavages between socioeconomic change and the work of the SSCs point toward the importance of judicial *structure* and legal *doctrine* in molding the business of SSCs.

The introduction of intermediate appellate courts (IACs) and the rise of SSC discretion to choose cases have been important structural changes.⁷⁷ In some states, the supreme court must hear whatever cases the trial court losers choose to appeal; there is no IAC, and no discretion to choose cases. In other states, however, the SSC is insulated by the expense of a double appeal—to the IAC, and from the IAC to the SSC—and is armed with the power to choose only “significant” cases. These are powerful filters, and they make the SSC relatively autonomous. In many states, certain types of cases are preferred by law. Some states provide for direct SSC review of all capital cases;⁷⁸ others provide for direct appeal to the SSC for workmen’s compensation cases;⁷⁹ in still another, disputes over taxation received direct review for most of the period included in this study.⁸⁰ Legal *doctrine* is an important factor as well. Statutes and court decisions stimulate litigation and appeals by providing new or different legal tools. The Warren Court’s decisions on the rights of criminal defendants were followed by a great upsurge in SSC criminal cases with procedural due process issues, even in states such as South Dakota and Maine, where crime rates are relatively low.⁸¹ Of course, the decisions of the Warren Court were not decided in a vacuum; they too were affected by socioeconomic change. But the Court’s new rules themselves entered the chain of causation and affected the work of the SSCs.

Legal changes that altered the way jurists classify disputes also sometimes increased litigation and appeals. Thus, appeals from workmen’s compensation boards more than replaced tort suits arising from industrial accidents, and zoning ordinances produced land use disputes in the SSCs that would not have qualified as common law nuisance claims. Other legal changes, however, help to account for *declines* in certain types of SSC cases, either by bringing about jurisdictional changes or by reducing the number of transactions that produced litigation in the past. New federal laws on labor

77. See notes 23-28 *supra* and accompanying text.

78. See, e.g., CAL. CONST. art. 6, § 11; ILL. CONST. art. 6, § 4.

79. TENN. CODE ANN. § 16-408 (1955); ILL. PRAC. R. 302(a) (1977).

80. See ILL. REV. STAT. ch. 110, § 118 (1908). The provision for taxes in the successor statute, ILL. ANN. STAT. ch. 110, § 75 (Smith-Hurd 1956), was repealed in 1963. Act of Aug. 9, 1963, 1963 Ill. Laws 2691.

81. See notes 62-63 *supra* and accompanying text.

relations, corporate securities, bankruptcy, and civil rights undoubtedly siphoned off some disputes into the federal courts. As a result of the federal laws and programs that brought more security to banking and mortgage lending, fewer banks failed. In the last century, hundreds of cases were generated by the collapse of banks. Perhaps in the future, "no fault" divorce and automobile accident statutes will have similar effects on family law and tort caseloads in the SSCs.⁸²

The adoption of rules that subsidize litigants' costs of appeal, particularly attorneys' fees, has an obvious effect on the workload in the SSCs. In criminal law, constitutional rulings have compelled the state to pay for counsel fees and costs of appeal in many cases.⁸³ For tort cases, the rise of the contingent fee has meant that injured parties do not assume the risk of losing their appeals. In many states, if the employer appeals a workmen's compensation award, the claimant need not engage his own counsel because the board or commission is compelled to defend; other states assess claimants' legal fees against defendants who lose appeals or limit the fees that can be charged by claimants' counsel.⁸⁴

Finally, the business of SSCs is undoubtedly affected by variations in *judicial culture*, especially as more and more courts acquire discretion to select cases. We noted that SSCs in similar states did not participate equally in the general increase in criminal and constitutional cases. Some of the variation may be due to differences in the style, values or priorities of judges, which they make known in their opinions or in other messages to the bar. Indeed, the general shift from commercial to noncommercial cases has probably itself been a product of changes in judicial culture. SSC judges have come to view their role less conservatively. They seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change.

82. If the workmen's compensation experience is indicative, however, "no fault" automobile rules may *not* have that effect, at least not as fully as one might expect. The introduction of liability without fault for industrial accidents did not remove industrial accident cases from SSC dockets. See note 57 *supra* and accompanying text. The apparent reason is that the "no fault" rules create new issues of statutory interpretation and leave such old questions as the extent of insurance coverage, which casualty insurance companies have a great propensity to litigate and appeal.

83. See note 62 *supra* and accompanying text.

84. See 3 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 83.10 (1976); NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, *supra* note 56, at 208.

IV. CONCLUSION

When we review the business of the SSCs over the last century, two changes stand out. First, in purely quantitative terms, SSC caseloads have *declined* from an early 20th-century peak. This is not from any lack of potential cases. Rather, the courts have gained greater control over their workload. As a result, they have been able to concentrate to a greater extent on cases that they consider important. They write longer opinions, and they are becoming more self-conscious about their role as policymakers.

The second shift has been toward *noncommercial* cases—from a concentration on debt collection and property cases to an emphasis on tort, criminal, public law, and family law matters. It is interesting that many of the newly popular areas, despite the great cost of appellate litigation, touch on the troubles of people further down the social and economic scale than those involved in most commercial and real estate cases. The victims of car and workplace accidents are as likely to be poor as to be rich; burglars and thieves notoriously are drawn from the lower ranks of society. This is not to say that the SSCs were ever preoccupied with cases involving very big business; few of the “Fortune 500” figure as litigants in the 5,904 cases—far fewer, certainly, than their place in the economy would suggest. But a half century ago and earlier, SSCs did deal primarily with *business* problems. This is no longer the case.

The explanations for these changes in SSC business are highly complex. Whole groups of variables—social and economic developments, court structure, legal doctrine, subsidies to poorer litigants, judicial attitudes—are linked in chains of cause and effect. In this Article, we stressed general trends. If we look more closely at interstate similarities and variations, more complete explanations are possible. It remains to be seen how much of the diversity among our 16 SSCs is explained by aggregate trends, how much by the local, the peculiar, the stubbornly legal. Our efforts in these directions will be reported in later publications.